

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

South Carolina Retirement System Investment Commission.....Petitioner,

v.

Curtis M. Loftis, Jr., as custodian of the South Carolina Retirement
Systems Group Trust.....Respondent.

PETITION FOR WRIT OF MANDAMUS,
AND REQUEST FOR EXPEDITED REVIEW

RECEIVED

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S.C. SUPREME COURT

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PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR
EXPEDITED REVIEW

Pursuant to Article V, Section 5 of the South Carolina Constitution and Rule 245(b) of the South Carolina Appellate Court Rules, the South Carolina Retirement System Investment Commission (the “RSIC” or “Commission”), petitions this Honorable Court in its original jurisdiction. RSIC seeks a Writ of Mandamus, directing Curtis M. Loftis, as custodian and the Treasurer of the State of South Carolina (“Treasurer”), to comply with mandatory requirements of the South Carolina Code of Laws regarding his role as a ministerial officer to disburse funds so that the RSIC can fulfill its legal and fiduciary duties and continue to exercise its exclusive authority to invest and manage the assets of the South Carolina Retirement Systems Group Trust (“Trust” or “Retirement System”) as provided by the South Carolina Code.

On November 8, 2012, the RSIC unanimously approved a \$50 million commitment to a private equity fund (the “Investment”) in full accordance with applicable law. Mr. Loftis, as an ex officio and voting member of the RSIC, supported and approved the Investment. On March 28, 2013, after satisfaction of all conditions and in accordance with its earlier decision, the RSIC closed on the Investment. On or about March 29, 2013, the RSIC received the initial capital call, regarding the Investment. Since that time, RSIC has repeatedly requested and directed Treasurer Loftis, as the custodian of the funds, to take the necessary steps to fund the Investment; however, Treasurer Loftis has refused to fund the obligation. Under the terms and conditions of the Investment, the funding must occur on or before April 16, 2013, or the Retirement System will be in default on its obligations. Treasurer Loftis’ refusal to perform his

ministerial duty has created an unprecedented potential default and crisis for RSIC, an unacceptable risk and, most importantly, significant harm to the Retirement System, its participants and beneficiaries, and the State of South Carolina. RSIC respectfully requests that the Court issue a writ of mandamus, requiring Treasurer Loftis to comply with his ministerial duties to fund the Investment. Additionally, in order to prevent the significant harm associated with a default of the Retirement System's investment obligations, RSIC respectfully requests that the Court expedite its consideration of this Petition, an abbreviated scheduling order, deadline for a return of no longer than three working days from the date of service, and an immediate hearing or determination on briefs, at the discretion of the Court so as to prevent the potential default.

QUESTION PRESENTED

Can the custodian of the Retirement System's trust funds, upon the lawful approval of an investment obligation by RSIC, refuse to exercise his ministerial obligations and fund the obligation?

INTRODUCTION

The General Assembly has established a comprehensive statutory framework for the administration of the Retirement System, which is a statutory trust, and the RSIC has the *exclusive* authority to manage and invest the assets of the Trust. The five public defined benefit pension plans operated by the State of South Carolina, which are defined in the Code as the "Retirement Systems", are the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System. S.C. Code Ann. § 9-16-10(8). The assets of the Retirement System are not

funds of the State, but are held in a statutory trust as provided in S.C. Code Ann. §§ 9-16-20(A) and (C). See also S.C. Code Ann. § 9-1-1310(C). The Public Employee Benefit Authority and the State Budget and Control Board serve as co-trustees of the Trust, holding legal title for the common benefit of over 525,000 past and present public servants of South Carolina and their beneficiaries. S.C. Code Ann. § 9-1-1310(A). The beneficiaries and participants of the Trust hold equitable title to the Trust's assets and funds. The seven-member RSIC has the exclusive authority to manage and invest all assets of the Trust. S.C. Code Ann. § 9-16-20(A). See also, S.C. Code Ann. § 9-16-315(G); S.C. Code Ann. § 9-16-340(A), and S.C. Code Ann. § 9-1-1310. The actual physical possession of the available investment funds in the Trust rests in the hands of the Treasurer, solely in a custodial, ministerial capacity.

The Treasurer did not always have such a limited role. Prior to 2005, the State Budget and Control Board and the Treasurer managed the investment functions of the Retirement System depending upon the type of the investments. However, in 2005, by the State Retirement System Preservation and Investment Reform Act, Act No. 153 of 2005 ("Act 153"), the General Assembly drastically modified this statutory scheme, creating the RSIC and bestowing upon the RSIC broad and exclusive investment powers formerly exercised by both the Treasurer and the Budget and Control Board. Act 153 effectively transferred all investment authority of the Budget and Control Board and the Treasurer to the RSIC, leaving in place the authority of the Treasurer, individually, to serve as "custodian" of the Retirement System's funds. Act 153 also provided that the Budget and Control Board would serve as trustee to the Retirement System trust. Subsequent to the passage of Act 153, the General Assembly also created the Public

Employee Benefit Authority (“PEBA”) in 2012, and provided that PEBA would serve as co-trustee. S.C. Code Ann. § 9-4-10(H); See also, S.C. Code Ann. § 9-1-1310(A). Thus, with the passage of Act 153 and the creation of PEBA, the General Assembly carefully established a system for the investment of assets of the Retirement System with three basic components: The RSIC possesses the exclusive power to invest, reinvest and manage the funds and assets of the Retirement System.¹ The Budget and Control Board and PEBA are designated as co-trustees of the Retirement System. Finally, the Treasurer serves as the custodian of the Retirement System’s funds.

RELEVANT FACTS

In discharging its statutory and fiduciary duties to manage and invest the Retirement System assets, the RSIC, its Chief Investment Officer, and their staff carefully evaluate, consider, investigate, and select appropriate investments for the benefit of the Trust. See Exhibit A, Affidavit of Hershel M. Harper, Jr. The Treasurer, as an ex-officio and voting member of the RSIC, has every opportunity to fully participate in all RSIC deliberations, and evaluate and discuss the merits of any proposed investments. Each member of the RSIC, including Mr. Loftis in his capacity as a member of the RSIC, receives detailed information and advice concerning the merits and risks of every potential investment. The RSIC carefully screens, reviews, and selects investments for the Trust’s beneficiaries and participants. All potential investments are

¹. The RSIC is seeking the writ of mandamus against Treasurer Loftis as a result of his refusal to perform his ministerial duties as the custodian of the investment funds. In refusing to fund the obligations of RSIC, the custodian has exceeded the authority conferred to him by the General Assembly as detailed in the various affidavits in support of this petition. This is not an action against the State of South Carolina, its agencies or instrumentalities or the co-trustees of the retirement system, rather it is against an individual officer acting in excess of his statutory capacity seeking a mandamus to require him to act within the limits of his authority. See, for example, Dacus v. Johnston, 180 S.C. 329, 185 S.E. 329 (1936).

presented to the RSIC for deliberation and decision and, if approved, are ultimately funded after an appropriate period of additional due diligence and a customary closing procedure. See Exhibit A, Affidavit of Hershel M. Harper, Jr. All members of the RSIC, including the Treasurer, are afforded access to all material details of all transactions through a safe, secure, and confidential review process.

After each closing, the RSIC routinely requests the fund custodian to direct the appropriate banking institution in which the accounts are held to establish a funding account for the investment so that funds may be provided to an investment manager to purchase the securities to be added to the Retirement System's portfolio. Reasonable cooperation between the RSIC and the custodian is essential in order that the Trust may meet its financial obligations in a timely and responsible manner. All of the investment are time and market sensitive. Many of the investments impose penalties and additional surcharges in the event of late payments. The custodian's delay in payment or the failure to pay within the established deadlines may result in the RSIC's, an RSIC received consequently the Retirement System's, default on contractual commitments and obligations to pay if the custodian refuses to cooperate. Were this to occur, it would cause significant harm to the Trust, its participants and beneficiaries, and the RSIC's reputation as a reliable investor. See Exhibit A, Affidavit of Hershel M. Harper, Jr.

In the Fall of 2012, the RSIC's investment staff, after careful evaluation and due diligence, recommended to the RSIC that it commit to invest up to \$50 million in a private equity fund managed by Warburg Pincus. The RSIC had experience with Warburg Pincus as it had made a \$100 million very successful investment in another Warburg Pincus private equity fund in 2007. See Exhibit A, Affidavit of Hershel M.

Harper, Jr. After the RSIC's Investment staff completed a comprehensive due diligence review of the proposed Investment, and the RSIC's Internal Audit & Compliance Department's review of the due diligence process noted no exceptions, the proposed investment was presented for consideration at the RSIC's November 8, 2012 meeting.

At the November meeting, the RSIC staff presented its recommendation to proceed with the Warburg Pincus investment. The RSIC's investment consultant provided the RSIC with its own, independently researched report, which concurred with RSIC staff's recommendation. The members of the RSIC unanimously approved proceeding with the investment in full accordance with its procedures and the applicable law. Treasurer Loftis attended the meeting, supported the recommendation, and voted to approve the Investment. The motion that the RSIC adopted unanimously approving the Investment was to:

Adopt recommendations of II-C-authorize an investment not to exceed \$50 million in Warburg Pincus Fund XI (the "Investment"); authorize the Chairman or his designee to negotiate and execute any necessary documents to implement the Investment as approved by the commission (1) upon documented approval for legal sufficiency by Legal Counsel, and (2) upon the expiration of the 30 day review period by the Commissioners as adopted by the Commission on July 19, 2012; and authorize Chairman and/or the CIO or their designee(s) to thereafter authorize the custodian of funds to transfer such funds as are necessary to meet the Retirement System trust funds' obligations with regard to the Investment.

See Exhibit B, Affidavit of Dori A. Ditty; Exhibit C, Affidavit of Darry Oliver; Exhibit D, Affidavit of Reynolds Williams.

As referenced in the motion, and pursuant to the operating procedures of the RSIC, a thirty-day review period for additional Commissioner review ensued after a determination of legal sufficiency and prior to closing. See Exhibit B.

Affidavit of Dori A. Ditty; Exhibit D Affidavit of Reynolds Williams. This review period commenced on January 30, 2013, when the RSIC's legal counsel forwarded written notice to the Commissioners advising them that the pertinent documents regarding the investment had been posted to a secure portal for review and that the review period would end on Friday, March 1, 2013. The RSIC's legal counsel also provided the Commissioners with electronic mail notice that the contract was legally sufficient and that at the end of the thirty-day period, legal counsel would forward the documents, along with affirmation that they had been found to be legally sufficient, to the Chairman for his review and execution pursuant to the RSIC's approved review process. See Exhibit B. Affidavit of Dori A. Ditty. The RSIC established an initial closing date of March 4, 2013.

Treasurer Loftis refused to accept the adequacy of the usual and customary electronic nature of the documents to be reviewed and also raised, for the first time, a few basic questions as to the adequacy of the custody of the assets after the funding of the Investment, after leaving his hands. At a February 28, 2013 RSIC meeting, Treasurer Loftis indicated he would not fund the Investment unless he was provided hard copies of certain of the documents even though electronic documents had been available to him since January 30, 2013. See Exhibit C, Affidavit of Darry Oliver; Exhibit D, Affidavit of Reynolds Williams. As a result of the Treasurer's threat to refuse to fund, the March 4th closing was postponed at some cost to the fund, and the RSIC provided the requested hard copies to Mr. Loftis the next day, March 1, 2013, giving him two weeks plus three days of additional review time. See Exhibit B, Affidavit of Dori A. Ditty; Exhibit

D, Affidavit of Reynolds Williams. During the extended review period, the RSIC continued to make reasonable efforts to address Treasurer Loftis's concerns, but he said he would not fund the Investment. The review period extension expired on March 18, 2013, and upon reaffirmation by the RSIC's legal counsel that the contract was legally sufficient, the RSIC's Chairman approved execution of the contract for the Investment, although the closing of the Investment was postponed by the investment manager until March 28, 2013. In the interim, various RSIC employees attempted to review and address Mr. Loftis's concerns about the Investment's custody arrangements in an effort to obtain his cooperation; however, Mr. Loftis reiterated to the RSIC that he would not fund the Investment. See Exhibit B, Affidavit of Dori A. Ditty; Exhibit C, Affidavit of Darry Oliver.

The RSIC Chairman called a special meeting relating to the Investment and the impasse which had arisen with the Treasurer on March 28, 2013, the day of the scheduled closing. See Exhibit D, Affidavit of Reynolds Williams. The RSIC staff provided a comprehensive overview of the process and represented its position that all of the policies and procedures had been followed in reviewing, evaluating, recommending and approving the Investment. Mr. Loftis was provided an opportunity to articulate his concerns. After a heated exchange, one of the Commissioners moved to adjourn the meeting. Mr. Loftis supported this motion and the motion carried, with Mr. Loftis failing to raise with the RSIC any specific issues with the Investment. See Exhibit B. Affidavit of Dori A. Ditty; Exhibit C, Affidavit of Darry Oliver; Exhibit D, Affidavit of Reynolds Williams. RSIC, in accordance with its regular procedures and its earlier decision,

proceeded to closing on the Investment the same day. The Investment fund accepted the RSIC's documents, and in accordance with the terms of the Investment, the RSIC received a capital call, issued by the Investment fund, on or about March 29, 2013. On March 29, 2013, RSIC staff forwarded to Treasurer Loftis the standard capital call directive paperwork and supporting documentation, which included the capital call notice and funding directive properly signed by the RSIC Chairman and the RSIC Chief Investment Officer. See Exhibit B, Affidavit of Dori A. Ditty; Exhibit C, Affidavit of Darry Oliver; Exhibit D, Affidavit of Reynolds Williams. The completion of this directive paperwork was a standard business function, which was in full accordance with procedures for prior investments and the course of dealing between RSIC and the Office of the State Treasurer. The notice to the Treasurer also provided that although the due date for the capital call was April 16, 2013, the Trust would save costs per day of excess late interest for each day the capital call was funded prior to April 16, 2013, so he was instructed to fund it no later than 5:00 p.m. April 1, 2013. See Exhibit C, Affidavit of Darry Oliver. Additional details and circumstances which may occur in the event of a default on the capital call for the Investment are contained in the affidavits in support of this action which have been filed contemporaneously herewith and are subject to confidentiality agreements; they contain materials which are not proper or intended for public disclosure. RSIC staff has followed up on a daily basis regarding the funding of the obligation, but Treasurer Loftis continues to expressly refuse to honor the obligation and fund the Investment. See Exhibit B, Affidavit of Dori A. Ditty.

ARGUMENT AND AUTHORITIES

This Court has the power to issue writs or orders of injunction or mandamus. S.C. Const. Art. V, § 5; S.C. Code Ann. § 14-3-310. The writ of mandamus is “the highest judicial writ known to the law.” Sanford v. S.C. State Ethics Comm’n, 385 S.C. 483, 685 S.E.2d 600, *quoting* Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169,170 (1963). The power to issue a writ of mandamus arises when necessary to enforce an established right or a duty created by law. *See, e.g.,* Edwards v. State, 383 S.C. 82, 95, 678 S.E.2d 412, 419 (2009)[Mandamus] is a coercive writ which orders a public official to perform a ministerial duty.) The “principal function” of mandamus “is to command and execute, and not to inquire and adjudicate; therefore, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established.” *Sanford*, 385 S.C. at 493, 685 S.E.2d at 605.

In order to obtain a writ of mandamus requiring performance of an act, petitioner must satisfy four elements: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner’s specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. Sanford, 385 S.C. at 494, 685 S.E.2d at 606; Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999).

The statutes which overhauled the structure of the Retirement System from 2005 through 2012, markedly diminished the roles of the State Treasurer and the

Budget and Control Board. In 2005, the General Assembly created the Retirement System Investment Commission (“RSIC”) to:

...invest the funds of the retirement system. All powers and duties of the State Budget and Control Board as investor in equity securities and the State Treasurer’s function of investing in fixed income instruments are transferred to and devolved upon the Retirement System Investment Commission... S.C. Code Ann §9-16-315 (G) (emphasis added).

The clear intent of the legislature was to create a highly qualified and competent commission to assume the prior responsibilities of the Budget and Control Board and the State Treasurer in order to carefully invest and re-invest the assets of the Retirement System (see also S.C. Code Ann §9-16-340). Notably, the RSIC’s decisions concerning management and investment are “exclusive” even though the assets of the Retirement System are held in Trust by the co-trustees. See S.C. Code Ann §9-16-20 (A) and S.C. Code Ann §9-1-1310.

The Treasurer wears three distinct hats in this statutory structure. He is: 1) a voting member of the Budget and Control Board and therefore a member of one of the organizations which serves as a co-trustee, 2) a voting member of the RSIC (see S.C. Code §9-16-315(A)(2), and 3) the “custodian” of the funds of the Retirement System, responsible for disbursement. The Treasurer has no independent and individual responsibilities other than as a fund custodian, and it is in this capacity as an individual and custodian of the funds of the Retirement System that he is brought before this Court for this extraordinary writ.

The RSIC closed on the Investment in its exclusive capacity and in accordance with its customary and usual operating procedures. Commissioner Loftis voted in favor

of the Investment at issue, and regardless of whether he has decided to change his views, the Commission acted within the scope of its lawfully delegated authority. The Commission undertook its usual due diligence, and closed on the Investment with full and proper authority. The only remaining step in this transaction are the perfunctory and ministerial tasks of opening up a new account for the Investment so that correct records may be maintained and “writing the checks” – that is, honoring the Retirement System’s contractual funding obligations, if, as and when they become due. The Treasurer, in refusing to open the account and write the check, is not acting with the authority of the RSIC, nor is he acting as an agent for the State Budget Control Board or PEBA. Rather, he seeks to delay, avoid or usurp control over the investment function as an individual fund custodian as indicated by his letter of objection sent in his capacity as the State Treasurer. See Exhibit 11 attached to Affidavit of Darry Oliver Ex. B.

As a custodian, the Treasurer does not have any authority or discretion to approve, review, ratify, or veto the investment decisions of the Commission through the power of the checkbook. As a custodian, the Treasurer’s authority derives from his legislative grant. The duties of a servant -custodian, while fiduciary in nature, are not greater than the obligations delegated to him by the master-legislature for the benefit of the trust. The duties which a Treasurer once held and over which he once had considerable discretion have been removed, eliminated and transferred based upon proper revisions to the law. As an individual custodian, with absolutely no authority or responsibility for the management or administration of the Retirement System, the Treasurer necessarily has no discretion and control over the final and exclusive investment decisions of the Commission. To hold otherwise would eviscerate the General

Assembly's exclusive delegation of authority to the RSIC to "invest and manage the assets" of the Retirement System's trust funds. S.C. Code Ann. § 9-16-20(A).

Numerous other jurisdictions have considered and acknowledged the limited role of a fund custodian in analogous circumstances. In Annuity Board of State Retirement System v. State Treasurer Levitan, 195 Wis. 561, 219 N.W. 97 (1928), the Wisconsin State Treasurer, as a custodian, refused to surrender various securities without providing a specific reason. Just as in this case, the funds were held in a statutory trust, and the Treasurer served as an ex-officio member of the retirement system agency responsible for investment decisions. The court first addressed the role of the custodian in this situation:

He is merely the treasurer of the annuity board. He is charged with no responsibility concerning the investment or the management of the funds and securities belonging to the state retirement system. Being merely the custodian of these funds and securities, the management of which is vested exclusively and comprehensively in the annuity board, he can incur no liability in making such disposition of the funds and securities deposited with him as may be directed by the annuity board. His duty is to safely keep such securities while in his custody, and there his duty ends.

The court went on to elaborate upon the standard which would apply to the custodian, and articulated that the standard was whether or not the investment was authorized by law. Stated differently, the sole inquiry for the custodian was to determine whether or not the annuity board was plainly exceeding its legal powers, not whether the investment itself was prudent or advisable. The treasurer as custodian cannot second-guess the business judgment of the annuity board and the court issued an appropriate mandamus.

Similarly, in a later Wisconsin case, State ex rel. Reynolds v. Smith, State Treasurer, 19 Wis. 2d 577, 120 N.W. 2d 664 (1963), the Wisconsin Supreme Court

determined that a treasurer- custodian may not lawfully refuse to sign a check when the disbursement is made for a lawful, authorized purpose. Execution of checks is a ministerial function and does not confer on the custodian-treasurer the power of independent veto or judgment over the proper discretionary acts of other government officials who are properly discharging their official duties and acting within the scope of their official duties. The test is this: whether the disbursement of funds is “palpably illegal”. The court observed: “So long as there exists any reasonable basis for the governor or attorney general’s exercising their discretion in the manner described, and there is no affirmative showing that their actions are palpably illegal, the state treasurer is bound to honor such exercise of discretion...” (emphasis added). In both Wisconsin cases, the court issued a mandamus directing the treasurer to disburse funds.

Likewise, Senske v. Fairmont Waseca Canning Co., 232 Minn. 350, 45 N.W. 2d 640 (1951), holds that a state treasurer custodian has a ministerial duty and must disburse funds when the management of those funds has been properly legislatively delegated and directed by a fund manager. “[H]is duties are strictly ministerial...Any attempt of the custodian, therefore, by stipulation or otherwise, to control the disbursement of disability benefits from the fund is but an empty and meaningless gesture. Whether total disability benefits are to be paid out of the fund rests solely in the sound discretion of the industrial commission, which by statute is directed to pay such benefits...he does not have, by virtue of the inherent nature of his custodianship, a right and duty, for the preservation of the fund, to resist disbursements... .”

In People ex. rel. Judges Retirement System v. State Treasurer Wright, 379 Ill. 328, 40 N.E. 2d 719, (1942), the Supreme Court of Illinois addressed the powers of their

custodial Treasurer in the context of the judicial retirement system of that state. As in this case, the treasurer served as an ex officio member of the retirement system and as a funds custodian. The court issued a mandamus against the custodian because he had refused to follow the instructions of the agency which had been lawfully delegated the responsibility to make investment decisions and properly fund their lawful activity. See also State Employer's Retirement Board v. Yelle, State Auditor, 31 Wash. 2d 87, 201 P.2d 172 (1948) (State treasurer-custodian is subject to proper mandamus to issue funds for retirement system and may not refuse this ministerial act so long as the investment is properly authorized by retirement agency.) Time after time, other jurisdictions have reached the identical result when confronted with a maverick public custodian who refuses to perform an existing legal duty. Krucker v. Goddard, 99 Ariz. 227, 408 P.2d 20 (1965) (A writ of mandamus will issue to compel a State Treasurer to properly fund a lawfully authorized decision to invest by a state retirement system). Dunlop, State Treasurer v. Wilkin-Hale State Bank, 67 Ok. 128, 169 P.2d 893 (1917) (A writ of mandamus properly lies against a State Treasurer to pay funds set aside for a lawful purpose.); State ex. rel. Preston v. Ferguson, Treasurer of State, 170 Ohio St. 450, 166 N.E. 2d 365 (1960) (Mandamus against a State Treasurer is a proper remedy to compel compliance with a proper governmental function.); Weaver v. Evans, 80 Wash. 2d 461, 495 P.2d 639 (1972) (Mandamus is a proper remedy against a public official for the wrongful refusal to fund and pay an outstanding legal obligation).

The South Carolina Attorney General has likewise spoken to this issue. In an opinion dated November 16, 2011 (2011 WL 6120331(S.C.A.G.)), he addressed the role of the Treasurer as a fund custodian:

Thus, in our opinion, based upon the foregoing authorities, the State Treasurer, as custodian of the various retirement assets, possesses no authority *as State Treasurer*, regarding the investment of retirement funds. The Treasurer, as custodian of the retirement assets, is a ministerial officer, responsible for the proper disbursement of the funds. While the Treasurer, as a member of the Commission plays a role in these investment functions, as Treasurer, he does not. His duties as custodian are principally ministerial. As discussed above, such duties encompass disbursement of the funds upon instruction and protection of those funds as a bailee. We hasten to emphasize again, however, that as custodian, the Treasurer is also a fiduciary and is responsible for the safekeeping of the retirement funds. As was said in the *Senske* case, and also noted in *Winnsboro National Bank* by virtue of the inherent nature of the Treasurer's custodianship, he has a duty to preserve the funds and to “resist disbursements and invasions [of the funds] which [has] no basis in law. (emphasis added)

This standard is nearly identical to the “palpably illegal” standard and whether the investment is lawful. The Commission has advised the custodian on at least three prior occasions that the Investment is lawful and repeatedly advised Mr. Loftis through various means that the Investment is “legally sufficient”. The custodian has come forward with no proof or objection to establish a scintilla of doubt as to the legality of the proposed Investment. The custodian, for whatever motive, has hijacked the lawful operation and administration of the Commission by refusing to perform a ministerial task assigned to him by State law, and the Commission has now very reluctantly been forced to bring this matter forward as a fiduciary in the interest of the Trust and its participants and beneficiaries.

This is a sad day for South Carolina. Not since the hostile takeover of the South Carolina Highway Department in 1935 has the hubris of a single governmental official been so damaging to the orderly administration and proper operation of good government. This is not an action against the State or any departments of the State;

rather, it is an action against the abuse of the power of office by an individual who has exceeded the limits of his authority. Dacus v. Johnston, 180 S.C. 329, 185 S.E. 329 (1936) (The Court noted with approval the following: “Where an officer of the State *exceeds* the authority conferred by law, or is proceeding under an unconstitutional law he may be liable to suit”). Platenius v. Arkansas, 20 How. 527, 15 L.Ed. 991 (1857). “When officers of the state act under invalid authority, or *exceed or abuse* their lawful authority...an action to redress injuries caused by the unauthorized acts is not a suit against the state, since the acts of the officials that are not legally authorized, or that exceed or abuse the authority or discretion conferred upon them, are not acts of the State.” L & N Railroad v. Railroad Commission 63 Fla. 491, 58 So. 543 (1912) (emphasis added).

In Dacus and its companion case Heyward v. Long, 178 S.C. 351, 183 S.E. 351 (1935), this court addressed the effect one person’s abuse over the power of the checkbook might have on the proper administration of government. In Dacus, the Governor had become entangled in a power struggle with the State Highway Commission. When the Governor did not get his way, he simply invoked the power of the checkbook, unilaterally suspended the Commissioners, and effectively refused to honor payment for the lawfully delegated obligations of the Commission. This Court properly condemned this public misconduct:

It must be patent that the Legislature never intended to place in the Governor such absolute and arbitrary power; it would be against public policy, and in the teeth of the manifest principles of the Constitution of the state.... The state highway commission can get funds for its operation in one way only. It must file with the comptroller general a claim for the sum or sums it needs, in the manner prescribed by law; if the comptroller general approves the claim, he will issue his warrant to the state treasurer authorizing

and directing its payment. If there has been an appropriation of the necessary funds, the state treasurer pays the warrant. The state highway commission does not disburse any of these funds. If it should be held that highway commissioners do disburse funds (which is not done), nevertheless the payment of the salary of Ben Sawyer cannot be held to be a violation of section 1592 of the Code. The payment of the salary was simply an administrative act of the highway commission which was amply and explicitly provided for by law.... The only limitation is that the appropriations must be made by law. The object of the constitutional provision prohibiting the payment of money from the state treasury except by appropriations made by law is to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody without legislative sanction therefor.... If it were conceded that the Governor had power under the statutes upon which he relies to suspend the highway commissioners, which power is not admitted, it is patent that the act of voting for the payment of the salary furnishes no legal ground for the exercise of such power (emphasis added).

The proper standard of inquiry for a public custodian of funds is simply this: if the fund request is made from a lawful agency for a lawful purpose, the custodian must, as a ministerial act, disburse the funds whether he agrees with the determination of the agency or not. This is his lawful duty as the custodian. He has no power other than this. Clearly, the custodian has a duty to perform the act and the act is ministerial in nature. The Petitioner cannot perform its official duties without the funding of the investment and the funding of the investment is necessary and in the public interest. No other legal remedy is available to the Petitioner to avoid the potential default, ensure the proper protection of the beneficiaries of the trust, and avoid waste. Accordingly, this Court should issue a mandamus directing the custodian to perform his ministerial act and fund the investment in accordance with the law and direct compliance with the law in the future. Petitioner requests, given the exigent circumstances of this matter and the significant public interest,

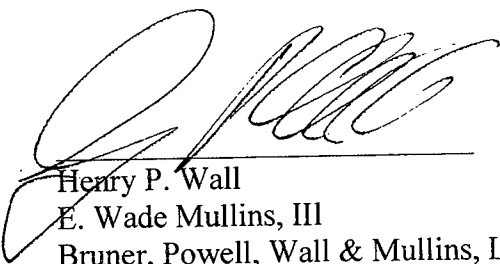
that the Respondent be directed and required to file a return to the petition within three working days of service, and for an expedited determination of the petition.

CONCLUSION

With the restructuring of the management and investment structure for the assets of the Retirement System, the General Assembly vested RSIC with the unmistakable and irrefutably exclusive authority to manage and invest such assets. As such, all authority of the State Treasurer regarding investment decisions was removed, with the sole remaining authority of the Treasurer limited to his capacity as custodian of the funds, which is ministerial in nature. The RSIC unanimously approved an investment in a private equity fund in full accordance with the applicable laws. The RSIC has repeatedly and lawfully requested and directed Mr. Loftis, as the custodian of the funds, to take the necessary steps to fund the Investment. Mr. Loftis has breached his legal, ministerial duty by refusing to fund this contractual obligation. Under the terms and conditions of the Investment, the funding must occur on or before April 16, 2013, or the Trust will be in default on its obligations.

Mr. Loftis's refusal to perform his ministerial duty has resulted in, and will result in, the RSIC, the Retirement System and its participants and beneficiaries, and the State of South Carolina incurring significant damages and risk. This Petition should be granted accordingly, and the Court should issue a writ of mandamus directing Mr. Loftis to take any and all necessary steps to fund the investment in Warburg Pincus Private Equity XI, L.P., and to permanently enjoin him to perform and comply with his ministerial duties as the custodian of the funds of the Retirement System.

April 11, 2013



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Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

South Carolina Retirement System Investment Commission.....Petitioner,

v.

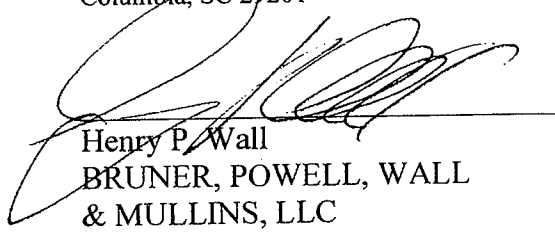
Curtis M. Loftis, Jr., as custodian of the South Carolina Retirement
Systems Group Trust.....Respondent.

PROOF OF SERVICE

I, Henry P. Wall, of Bruner, Powell, Wall & Mullins, LLC, attorneys for
Petitioner do hereby certify that on the 11th day of April 2012, I caused to be served the
**Petition for Writ of Mandamus and Request for Expedited Review and all
supporting exhibits and affidavits** upon Respondent by causing those documents to be
hand-delivered via process server to the following offices :

Honorable Curtis M. Loftis, Jr.
South Carolina State Treasurer
1200 Senate Street, Wade Hampton Office Building
Columbia, SC 29201

Honorable Alan Wilson
South Carolina Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201



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